Supreme Court, U.S.
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No. 97-679

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1997

AT&T CORP.,

*Petitioner,*

v.

CENTRAL OFFICE TELEPHONE, INC.,

*Respondent.*

**On Writ of Certiorari**
**To The United States Court of Appeals**
**For The Ninth Circuit**

# RESPONDENT'S BRIEF

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## QUESTIONS PRESENTED

Should the filed rate doctrine be extended to:

1. Bar claims by competitors,

2. Bar intentional tort claims that do not seek to enforce a discriminatory rate,

3. Prohibit recovery when a carrier engages in willful misconduct, unrelated to rates,

4. Prohibit recovery for carrier breaches of gap filling provisions (contractual agreements regarding terms which do not affect rates), or

5. Bar contract claims between carriers when the Communications Act allows carrier-to-carrier contracts?

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## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

#### A. The Parties

Central Office Telephone, Inc. ("COT") is a switchless reseller of long-distance telecommunication services. AT&T is a facilities-based long-distance carrier. Switchless resellers purchase "bulk" services from facilities-based carriers and resell those services (as carriers) to their own customers. Switchless resellers qualify for significant discounts by combining the business of multiple end users who would not individually qualify for volume discounts at the same level. COT was thus both a customer and a competitor of AT&T.

#### B. AT&T Promotes SDN to Switchless Resellers

In the fall of 1989, AT&T initiated special promotions to encourage resellers to resell AT&T's "Software Defined Network" ("SDN") to end-users, even though this would increase competition for AT&T's end-user customers. AT&T initiated these special promotions as a counter to competition from MCI and Sprint. ER 365-66. [1] SDN is a virtual private network service that allows an AT&T customer, in consideration for a commitment to

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[1] For the purposes of this brief, the following citation abbreviations apply: Ninth Circuit Excerpts of Record: ER; Ninth Circuit Supplemental Excerpts of Record: SER; Joint Appendix: J.A.

purchase large volumes of long distance usage, to receive substantially higher discounts than provided for other available AT&T long-distance services. ER 589-90, 2529, 3526, 3545, 3021-23.

### C. COT Signs Up for SDN

In response to the AT&T promotions, COT decided to purchase AT&T's SDN services. On October 30, 1989, COT signed a letter agreement memorializing its selection of SDN Expanded Volume Program Plan 2, including Custom SDN. AT&T Brief Appendix (hereinafter "AT&T Br. App.") 27a. Under this plan, COT would receive up to a 20% discount off basic SDN rates in exchange for a renewable commitment to purchase 2 million minutes of SDN annually. J.A. 26; ER 431, 3721-24. COT also selected the SDN Multiple Location Billing ("MLB") Option under which AT&T would bill up to 6,000 of COT's customer locations at no extra charge. ER 414-16. SDN rates were tariffed; MLB was not tariffed. ER 3148.

COT experienced provisioning delays shortly after it began selling SDN services. To address these delays, AT&T suggested that COT "park" its customers under a new and different tariffed service known as Multi-Location Calling Plan ("MLCP"). ER 418-21. Its stated purpose was to serve COT's customers' long-distance needs until they could be provisioned onto SDN. Id. COT signed up for MLCP on March 8, 1990. ER 417, 3737-38A.

On April 9, 1990, AT&T informed COT that its first account had been placed onto the SDN (ER 432) and that COT could now upgrade its SDN commitment.





Believing that SDN services were finally functional, COT upgraded its SDN subscription to Plan 6, which offered a larger discount (up to 25%) in exchange for a larger volume commitment (15 million minutes annually). ER 431, 4037.

### D. AT&T Decides to Drive Switchless Resellers Out of Business

Unbeknownst to COT, on or about March 1, 1990, a new management team within AT&T, under the direction of Michael Keith, determined that SDN switchless resellers constituted a threat to AT&T's profitable PRO-WATS offers to small businesses. ER 1211. In a reversal of its previous stratagem of soliciting switchless resellers, AT&T decided that the switchless resellers should be eliminated, and that they should henceforth be treated as unwanted competitors. J.A. 56-58, 54-55. Mr. Keith directed the formation of a Committee to "kill" the arbitrage by which resellers conducted their business. J.A. 63 64; ER 1203-19.

Mr. Keith's Committee developed multiple "roadblocks" (ER 1044-45) to modify the SDN offer so as to eliminate switchless resellers.[2] J.A. 64. The "roadblocks" began to surface soon after COT contracted with AT&T:

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[2] A memorandum prepared by Mr. Keith stated that the reason for modifying SDN was to "deflect cockroaches." J.A. 64. At that time AT&T managers were referring to resellers as "cockroaches and slimes and convicts. . ." J.A. 63.

(1) AT&T provisioned SDN service for switchless resellers at a glacial pace. ER 458. Eight months after activating his Committee, Mr. Keith predicted: "With a one percent provisioning rate [resellers] won't be around much longer." ER 1277.

(2) AT&T's telemarketers contacted COT's SDN customers and, without authorization, converted them to AT&T long-distance service, a practice known as "slamming." ER 746, 1579, 1877, 4278-96.

(3) AT&T misappropriated customer information from COT's confidential database. ER 3094.

(4) AT&T failed to implement the MLCP orders that COT submitted and failed to advise COT that it had not implemented the orders until months later; by that time, many of COT's customers had departed. ER 423, 480-81, 738, 1664, 1963, 2612, 4205-06.

(5) Contrary to its tariff (AT&T Br. App. 28a), AT&T billed for its services through a billing option ("LABO") that COT had rejected as inappropriate for its business. ER 414. Using LABO, AT&T delivered bills to COT's customers allocating to them 100% of COT's discount, with the result that COT did not receive any revenues. ER 468-69, 471, 968, 1709, 1754.

(6) AT&T adopted a policy against allowing cash payments due to COT and other resellers resulting from other AT&T discounts, intending to "kill the resellers' cash flow." ER 1344, 3739-41.





(7) Through a practice known as "suppressed" billing, AT&T did not bill COT's customers for months after they had used COT's services. ER 517, 1898-99. Suppressed billing suspended payments that were due to COT, and it made COT's customers irate and unwilling to pay amounts that were in fact due. ER 488, 524-26, 1576, 4263, 4308.

(8) AT&T denied COT and other resellers SDN calling cards, account teams, and SDN User Association memberships (which AT&T provided to its other customers), and blocked international calling card calls offered under COT's chosen tariff option. AT&T Br. App. 27a; ER 403, 440-42, 696-97, 748-50, 753-55, 830, 1837-40, 1874-75, 2577.

(9) AT&T transferred COT and other switchless resellers from local AT&T account teams to a Central Development and Operations Center in New Jersey (the "CDOC"), which AT&T knew would provide minimal service. ER 440-42, 1890-91. Indeed, several weeks after COT had been sending MLCP orders, as instructed, to the CDOC, an AT&T staffer finally called to ask "who Central Office Telephone was, and what in the world was all this paper [it was sending to New Jersey]." ER 1847. He then stated that he "would not process [COT's] MLCP orders." ER 1848.

(10) Despite COT's request, AT&T refused to acknowledge responsibility to COT's customers for the many problems they were encountering. ER 486, 516-17, 1893-94.

Through these and other "roadblocks," AT&T nearly drove COT out of the reseller business. To survive, COT was forced to terminate its contract with AT&T in September 1992, with one and one-half years remaining on the contract. ER 486, 515-17, 1942. As of the termination date, COT had lost over 75% of its customer base. ER 3085.

The foregoing review of the facts presented to the jury is necessary because AT&T's 14 page recitation of its view of the case essentially advocates impeachment of the jury verdict. AT&T virtually ignores that COT was its competitor, and that a jury disbelieved AT&T's attempted explanations for its anti-competitive conduct.

## II. PROCEEDINGS BELOW

COT sued AT&T in 1991 asserting, among others, state law claims for intentional interference with business relationships and for breach of contract based upon AT&T's willful misconduct. J.A. 3. These two claims are the ones that were tried to the jury in the summer of 1994. J.A. 77.

The jury was instructed, without objection, concerning COT's claim for damages for intentional interference with its business relationships with customers:

> COT asserts that AT&T intentionally interfered with its business relations and expectations of future business relations with its customers, the end users of its SDN service. In order to prevail on this claim, COT must prove by a preponderance of the





> evidence, one, that COT had business relations with the probability of future economic benefit. Two, that AT&T was aware of the relationships and expectation of future benefits. Three, that AT&T intentionally interfered with COT's business relations. Four, that AT&T interfered for an improper motive or by using improper means. And, five, that COT suffered economic injury as a result of the interference.

J.A. 70.

The jury was also instructed: ". . . AT&T may be liable to COT for breach of contract only if AT&T engaged in willful misconduct. . . . Willful misconduct is defined as an intentional act or omission performed either with the knowledge that the act or omission will probably harm someone else, or in a manner that implies reckless disregard of probable consequences to others." J.A. 70.

The jury found in favor of COT on each claim, and awarded $13 million in actual damages, later reduced by the trial court to $1.154 million. The trial court denied AT&T's motion for judgment notwithstanding the verdict, stating:

> "COT's claims for breach of contract and intentional interference with prospective business advantage were tried to the jury, which was instructed that it could award damages only if it found that AT&T had

> engaged in willful misconduct . . . I am satisfied . . . that sufficient evidence supported the jury's conclusions as to liability on COT's claims and AT&T's counterclaim." AT&T Petition for Certiorari Appendix (hereinafter "AT&T Petn. App.") 33a, 35a, 36a.

On appeal, the Ninth Circuit affirmed as to liability, and remanded for trial on punitive damages. With respect to AT&T's filed rate doctrine argument, the Ninth Circuit held, among other things, that because COT's claims did not involve rates or rate-setting, the doctrine did not apply.

Judge Brunetti dissented. His dissent is based on the view that COT demanded, in the language of AT&T's "Question Presented" (AT&T Br. i), "better, costlier, and more valuable services than required by the terms of the governing tariff and received by similarly situated customers." Yet there was no evidence put before the jury of better, costlier or more valuable services being sought[3] --

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[3] Every time throughout AT&T's appellate briefing of this case that the terms "side deals," "preferences," "better service," costlier service," "more valuable service," guaranteed service," and "enhanced service" appear, and they have appeared constantly, the terms have been nothing more than the characterizations of AT&T's appellate counsel. At no point in the trial record before the jury did AT&T's counsel apply any one of these characterizations to COT's claims, nor was there any evidence offered to show that the services AT&T agreed to provide COT were "better," "costlier" or "more valuable" services than AT&T offered to similarly situated customers. Likewise, there was no testimony on the part of any witness at trial, or contention by AT&T's trial attorneys, that COT was challenging the "reasonableness" of any





only that the services contracted for had been willfully withheld.

## SUMMARY OF ARGUMENT

1. The filed rate doctrine was created to protect consumers in highly regulated, monopolistic industries. In order to prevent gouging or discriminatory conduct, service providers were required to submit their rates and rate-affecting terms to regulators, who would determine whether the terms were reasonable and non-discriminatory. The filed rate doctrine was intended to prohibit circumvention of the tariffs designed to protect customers. The filed rate doctrine should not be extended beyond its original purpose.

The filed rate doctrine should not be extended to competitor claims. As determined by four of the five circuits faced with this question, the doctrine's purpose, protection of customers from gouging and other discriminatory conduct, is not accomplished by applying the doctrine to competitor claims.

2. This Court established over a century ago that carriers are prohibited from limiting their liability by tariff for claims based upon willful misconduct. Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 S. Ct. 1098

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tariffed charge. Rather, the testimony was directed to the admitted failure of AT&T to provide the services for which COT contracted. There is simply no trial record supporting AT&T's position in this appeal.

(1894). Thus, carrier tariffs do not preclude an intentional tort claim arising under state law, at least where, as here, the claim does not seek to enforce a discriminatory rate or require the Court to determine a reasonable rate. COT's claims had nothing to do with a misquoted or misrepresented rate. COT paid the same rates as other AT&T customers. COT sought no undue or unreasonable preference or advantage from AT&T. COT's claim for intentional interference with business relations was based, in part, on AT&T's willful failure to provide the services set forth in its tariff. Both the savings clause, Section 414 of the Communications Act, and Section 2.3.1 of the governing tariff, preserve COT's claims. See Nader v. Allegheny Airlines, 426 U.S. 290, 96 S. Ct. 1978 (1976).

3. Even if the tariff exclusively governed the relationship between AT&T and COT, the tariff itself authorizes COT's claims. Section 2.3.1 of the tariff states that AT&T's liability for willful misconduct is not limited by the tariff. The jury found that AT&T engaged in willful misconduct. COT's claims were entirely consistent with the tariff.

4. AT&T misstates and misapplies the filed rate doctrine. Its expansive reading of the doctrine is not supported by the doctrine's purpose or by the Communications Act. The Act requires AT&T to tariff its rates and terms affecting rates. The filed rate doctrine prohibits agreements contrary to the tariffed rates or rate-affecting terms. Neither the Act nor the filed rate doctrine prohibits gap filling agreements regarding services which are not fully addressed by the tariff and are not rate-





affecting. AT&T's marketplace behavior and admissions acknowledge this principle.

5. The Communications Act does not require that tariffs exclusively govern the relationship between two communications carriers. The Act allows two carriers, such as AT&T and COT, to order their relations by contract. Even if COT had sought to enforce contractual terms that were inconsistent with AT&T's tariff, which it did not, as a carrier COT was permitted to do so.

6. Expanding the filed rate doctrine would be inconsistent with the Telecommunications Act of 1996, which contains the most recent expression of congressional intent and completes a shift away from tariffs as an essential tool for preventing discrimination.

For all of these reasons, the judgment of the Ninth Circuit should be affirmed.

## ARGUMENT

### I. COMPETITOR CLAIMS ARE NOT BARRED BY THE FILED RATE DOCTRINE

Less than two years after Congress passed the Telecommunications Act of 1996 with the express purpose "to promote competition . . .", AT&T urges this Court to extend the filed rate doctrine to immunize it from claims by a competitor for anti-competitive conduct. The tariff-filing requirements of the Communications Act and the filed rate doctrine were created to regulate the relations of carriers and their customers and to protect customers from price

discrimination. They were not created to regulate, and they should not be interpreted to apply to, relations between competitors. The purpose of the filed rate doctrine, protecting customers from price discrimination, is not achieved by extending the doctrine to competitor claims.

Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 43 S. Ct. 47 (1922), considered the interplay between the filed rate doctrine and antitrust law. In Keogh, the Court held that antitrust claims for an alleged conspiracy by eight railroads to set higher rates were barred by the filed rate doctrine. The doctrine applied because (1) the plaintiff shippers had alternative means of redress, (2) the goal of uniform rates would be undermined by allowing such claims, and (3) the Court would otherwise be required to speculate as to the appropriate rate, an analysis better left to the ICC. However, the plaintiffs in Keogh were not the defendants' competitors.

Since Keogh, court decisions applying the filed rate doctrine have drawn a sharp distinction between consumer actions challenging rates and actions brought by actual or potential competitors for anti-competitive activity even when those claims challenge rates.[4]

In City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1176-79 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983), the Eighth Circuit refused to extend the filed rate

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[4] An informative discussion of the distinction, as it relates to antitrust claims, may be found in P. Areeda & H. Hovenkamp, Antitrust Law § 227.2c (Supp. 1997).





doctrine to bar claims by competitors. The City of Kirkwood bought electric power from Union Electric and sold it to retail customers. Union Electric also sold power to retail customers as with COT in this case. The City of Kirkwood was thus a customer as well as a competitor of the carrier. It sued, under antitrust laws, claiming a price squeeze. The Eighth Circuit soundly rejected application of the filed rate doctrine to competitor claims:

> The filed-rate doctrine does not preclude antitrust liability in the case at bar. An award of antitrust damages for a price squeeze would not conflict with the doctrine's purpose, which is to ensure rate uniformity by confining the authority to oversee the reasonableness of rates to a single regulatory agency. . . .

City Kirkwood, 671 F.2d at 1179 (citation omitted).

The filed rate doctrine was created to protect customers, not to preclude complaints by competitors. As stated in City of Kirkwood:

> The Third Circuit noted in Essential Communications Systems, Inc. v. American Telephone & Telegraph Co., 610 F.2d 1114, 1121 (3rd Cir. 1979) that the doctrine was created to protect customers, not competitors. "[T]he filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors...; competitors are not the intended

> beneficiaries of that rule of public utility regulation." See also Litton Systems, Inc. v. American Telephone & Telegraph Co., 487 F. Supp. 942, 951 (S.D.N.Y. 1980). Kirkwood alleges that it has been injured as a competitor, not as a customer, though it stands in both relations to [Union Electric Company]. A rule formulated to ensure uniformity of rates as between customers should not give an unfair advantage to a utility in its dealings with competitors.

671 F.2d at 1179.

The Third Circuit likewise has refused to extend application of the filed rate doctrine to competitor claims. In Essential Communications Systems, Inc. v. American Tel. & Tel. Co., 610 F.2d 1114 (3rd Cir. 1979), the court analyzed application of the filed rate doctrine in the telecommunications field. The court first addressed the regulatory differences between the telecommunications industry and the railroad industry:

> The [Communications] Act does not impose on the telecommunications industry the kind of comprehensive regulation which, after 1920, the ICC exercised over the railroads. In addition, Section 414, the savings clause which preserves common law remedies and a specific anti-trust exemption for mergers suggest that no exemption was intended by Congress.





610 F.2d at 1120.

With this background the Third Circuit distinguished Keogh:

> AT&T's primary obligation under the 1934 Act is to adhere, in its dealings with customers, to its filed rates. That primary obligation is the heart of public utility regulation, because if carriers were free to depart from filed rates, the prohibition against discrimination among customers could be evaded. However, the filed rate rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors in the equipment supply business; competitors are not the intended beneficiaries of that rule of public utility regulation.

610 F.2d at 1121 (emphasis supplied). See also In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1161 (3rd Cir. 1993), cert. denied 510 U.S. 1091 (1994) ("We have held that Keogh does not apply to claims of competitors.").

In addition to the Eighth and Third Circuits, the Second and Ninth Circuits have refused to apply the filed rate doctrine to block claims brought by competitors. City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2nd Cir. 1981) (cities' claims for price squeeze and delayed offering not barred by Keogh doctrine because it impacts competitors not customers); Columbia Steel

Casting Co., Inc. v. Portland General Electric Co., 103 F.3d 1446, 1465 (9th Cir. 1996), as amended on denial of rehearing, 111 F.3d 1427 (1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. Jul. 2, 1997) (No. 97-49) (Keogh will not be "overextended to allow a blockade of a competitor to escape scrutiny"); Cost Management Services, Inc. v. Washington Natural Gas, 99 F.3d 937, 945 (9th Cir. 1996) ("the weight of authority, and the better-reasoned authority, supports [the] argument that Keogh simply does not apply to . . . rate-related suits brought by competitors, as opposed to customers, of regulated entities").

Without expressly recognizing the distinction between consumer and competitor claims, the Seventh Circuit has declined to apply the doctrine to suits by competitors. See, e.g., MCI Communications Corp. v. American Tel. and Tel. Co., 708 F.2d 1081, 1104 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (FCC's regulatory authority did not preclude application of Sherman Act to claims arising from delay, interconnection problems, improper installation and improper maintenance); City of Mishawaka, Ind. v. Indiana & Michigan Elec. Co., 560 F.2d 1314, 1318-21 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978) (denying immunity for price squeeze claim by competitor/customer arising out of relationship between electric utility's filed wholesale and retail rates).

District courts have followed suit.[5]

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[5] Frontier Enterprises, Inc. v. Amador Stage Lines, Inc., 624 F. Supp. 137, 142-143 (E.D. Cal. 1985); Capital Freight Services, Inc. v. Trailer Marine Transport Corp., 704 F. Supp. 1190, 1195 (S.D.N.Y. 1988).





The Sixth Circuit alone has applied the filed rate doctrine to some, but not all, competitor claims. Pinney Dock and Transport Co. v. Penn. Cent. Corp., 838 F.2d 1445 (6th Cir.) cert. denied, 488 U.S. 880 (1988). In Pinney Dock, a shipper alleged that another shipper committed anti-trust violations by conduct principally relating to rates and charges. Although the court "recognize[d] that the anti-discrimination arguments behind the Keogh doctrine lose their force in competitor lawsuits . . .", it refused to allow the claims as they related to rates and charges. 838 F.2d at 1457. Significantly, the Sixth Circuit remanded Pinney Dock to allow the plaintiff an opportunity to amend to assert claims for conduct unrelated to rates. Id. at 1458.

In Pinney Dock, the Sixth Circuit relied upon State of Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 65 S. Ct. 716 (1945), reh. denied, 324 U.S. 990 (1945), in which the State of Georgia brought an action against railroads for price fixing. The State sued on behalf of its citizens, customers of the railroads, and on its own behalf as the owner of a railroad. As pointed out by subsequent courts,[6] the Sixth Circuit's reliance on Georgia v. Pennsylvania

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See also Cooperative Communications v. AT&T, infra, 867 F. Supp. at 1518-19 (filed rate doctrine does not apply where competitor sues AT&T for state tort and statutory claims).

[6] In re Lower Lake Erie Ore Antitrust Litigation, 998 F.2d at 1161, n.6; Cost Management Services v. Washington Nat. Gas, 99 F.3d at 946-48; and Capital Freight Serv. v. Trailer Marine Transport, 704 F. Supp. at 1195.

R.R. Co. is curious. First, although the State sued as a proprietor, the Supreme Court viewed this allegation "merely as a 'makeweight'". 324 U.S. at 450. Second, although this Court rejected the State's claim for damages (based presumably on injuries to the carriers' customers), it allowed the State to proceed on its claim to enjoin price fixing. Id. at 453. Finally, for purposes of this case, Georgia v. Pennsylvania R.R. Co. is distinguishable because the conduct complained of related solely to rates.

Not once in its opening brief does AT&T mention that it was a competitor of COT. Anxious to portray this as a case of simple breach of contract or negligence, AT&T simply avoids the fact that COT and AT&T were competitors.

COT, for its part, has consistently highlighted its competitive relationship with AT&T.[7] The evidence supported COT's allegations. For example COT's President, Gordon Rood, testified:

> "Q. . . . Did you anticipate, as part of your target group of customers, when you

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[7] In its amended and supplemental complaint, COT alleged: "AT&T itself acts as a reseller in competition with plaintiff and other resellers by seeking out plaintiff's existing and prospective customers for itself." J.A. 20.

In the pretrial order, COT contended: "AT&T provided a lower level of services . . . to COT than COT was originally provided under its Phase II and Phase VI Agreements than AT&T provided for itself and commercial customers in competition with plaintiff." J.A. 41.





> went out on SDN, to resell AT&T's PRO WATS customers?
>
> "A. Absolutely.
>
> "Q. . . . And what was the reason that you thought you could get those customers?
>
> "A. Well, number one, price alone. AT&T service, we were - - we could offer AT&T customers what we considered a better AT&T service, the best service they offered, and we could offer it at rates probably 22 to 25 percent below what they were paying on PRO WATS or WATS." ER 386-87.

AT&T representatives confirmed the competitive relationship (ER 326, 713-14, 991-992, 1228, 1306, 1381-83, 1579, 1585-86, 1591, 2309-10, 2687, 3317), and AT&T witnesses also acknowledged that it was the resellers' ability to draw away AT&T's PRO-WATS customers that sparked AT&T's decision to put resellers out of business. J.A. 54-58; 62-64; ER 1202-03, 1211, 1222-23, 1231, 1237, 1245.

COT established to the jury that AT&T set out to eliminate it as a competitor by intentionally interfering with COT's relationships with its customers. The rationale underlying the filed rate doctrine is inapplicable to competitor claims.

## II. CARRIER TARIFFS DO NOT PRECLUDE OR PREEMPT INTENTIONAL TORT CLAIMS THAT ARISE UNDER STATE LAW

### A. The Filed Rate Doctrine Does Not Bar Intentional Tort Claims That Do Not Seek to Enforce Discriminatory Rates

This Court created the filed rate doctrine on the premise that a statute would not be construed to take away a pre-existing common law right "unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437, 27 S. Ct. 350 (1907). The common law right to recover from a carrier for its willful misconduct pre-dates the Communications Act. This Court established over a century ago that carriers are prohibited from limiting their liability by tariff for claims based on willful misconduct. Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 S. Ct. 1098 (1894).

To hold that COT's intentional tort claim is barred by the filed rate doctrine requires a conclusion that allowing the claim would render the Communications Act nugatory. In Abilene Cotton and subsequent decisions (including those cited by AT&T) the Court relied upon statutory prohibitions of undue preferences and unreasonable discrimination to bar common law claims seeking special





rates, or additional services that would have the effect of creating special rates.

COT's recovery for intentional interference with business relations, based on anti-competitive conduct that included (but was not limited to) AT&T's deliberate failure to provide the services set forth in its tariff, did not create the sort of preference or discrimination that this Court's prior decisions have sought to prevent. COT did not recover for being denied special privileges. It recovered because AT&T created "roadblocks" to COT's business, in order to eliminate a competitor. Upholding COT's intentional tort claim would have no effect upon the policy against preferences and discrimination that gave rise to the filed rate doctrine, much less render nugatory the statutory scheme.

An intentional tort claim is barred by the filed rate doctrine *only* where the claim would require a court to either enforce a discriminatory rate or assess the reasonableness of a proposed rate. Claims that do neither do not "affect" rates within the meaning of the Communications Act and therefore are not barred by the doctrine. Thus, many courts have held that claims against carriers for intentional torts, antitrust violations, and other anti-competitive conduct are outside the scope of the filed rate doctrine. See Columbia Steel Casting Co. v. Portland General Elec. Company, 103 F.3d 1446 (9th Cir. 1996), as amended on denial of rehearing, 111 F.3d 1427 (1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. Jul. 2, 1997)(No. 97-49) (filed rate doctrine inapplicable to customer's claim against utility for Sherman Act violation, based on utility's refusal to wheel another utility's

electricity to customer's plant); In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1159 (3rd Cir. 1993), cert. denied, 510 U.S. 1091 (1994) (holding Keogh does not preclude liability based on non-rate anticompetitive activity); Pacific S.S. Co. v. Cackette, 8 F.2d 259, 261 (9th Cir. 1925), cert. denied, 269 U.S. 586 (1926) (assault claim by steamship passenger not barred by tariff requirement that it be presented within 10 days after landing; notice of such claim has "no perceptible relation to rates and charges for transportation"); Fax Telecommunicaciones v. AT&T, 952 F. Supp. 946 (E.D.N.Y. 1996) (doctrine did not bar claim alleging contract to install pipe for dedicated service to operator of calling center; enforcement of contract would neither require court to assess reasonableness of rates nor discriminate in pricing); Cooperative Communications, Inc. v. AT&T Corp., 867 F. Supp. 1511 (D. Utah 1994) (doctrine did not bar claims for intentional interference with prospective economic relations and business disparagement; allowing claims would not result in discrimination); Gelb v. American Tel. & Tel. Co., 813 F. Supp 1022 (S.D.N.Y. 1993) (doctrine did not bar action by holders of calling cards alleging carrier concealed costs of using cards, although carrier had filed tariff specifying its charges for card use).

On the other hand, Marco Supply Co., Inc. v. AT&T Communications, Inc., 875 F.2d 434 (4th Cir. 1989) is typical of cases that would have required enforcement of a discriminatory rate. Marco Supply contracted with AT&T based on quotations of certain rates, which were substantially less than the amounts AT&T had filed in its tariffs. The trial court dismissed Marco Supply's claims for





breach of contract and willful misrepresentation based on the filed rate doctrine, and the Fourth Circuit affirmed.

The intentional tort claim in Marco Supply ran afoul of the filed rate doctrine because allowing the claim would have entitled the plaintiff to a lower rate than that set forth in AT&T's tariff and charged to other customers.[8]

By contrast, in the present case COT's claims had nothing to do with a misquoted rate, a misrepresentation as to rates, or a scheme to submit fraudulently inflated rates to the FCC. Nor did COT seek to impose an obligation on AT&T to provide premium service (tariffed at a premium rate) at the same rate as a standard service (tariffed at a standard rate). Compare Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 35 S. Ct. 494 (1915); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566, 41 S. Ct. 584 (1921).

Here, COT paid the same rates as AT&T's other customers for SDN services. While AT&T provided those services to its non-reseller customers, AT&T provided COT and other resellers with inferior service designed to be so defective as to drive resellers out of business. AT&T's

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[8] Similar claims were barred in Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2nd Cir. 1994); Taffet v. Southern Co., 967 F.2d 1483 (11th Cir.) (en banc), cert. denied, 506 U.S. 1021 (1992); and H.J. Inc. v. Northwestern Bell Telephone Co., 954 F.2d 485 (8th Cir.), cert. denied, 504 U.S. 957 (1992). See also Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 106 S. Ct. 1922 (1986) (holding that filed rate doctrine barred claim for alleged conspiracy to submit fraudulently inflated rates to regulating agency).

wrongdoing had nothing to do with rates, and to conclude that the filed rate doctrine bars the intentional tort claims at issue here would radically expand the scope of the doctrine.

### B. Intentional Tort Claims Are Preserved by the Savings Clause of the Communications Act

Congress did not intend the Communications Act to preempt or bar all common law claims. To the contrary, the right to bring such claims is specifically preserved by the savings clause of the Act, 47 U.S.C. § 414 (COT Brief Appendix, hereafter "COT Br. App." 7a):

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

In Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 96 S. Ct. 1978 (1976), a unanimous court interpreted a virtually identical clause as preserving a passenger's common law claim for fraud based on an airline's failure to disclose its overbooking practices. 426 U.S. at 298-300. The Court found that a common law fraud action and the Aviation Act, not being "absolutely inconsistent", could co-exist as "contemplated by § 1106 [of the Aviation Act, 49 U.S.C. § 1506]." On the basis of Section 414 and Nader, courts have repeatedly held that common law claims against carriers are not preempted by the Communications Act. See, e.g., In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633-34 (6th Cir. 1987)(holding





state law claims for fraud and deceit, based on carrier's failure to notify customers of practice of charging for uncompleted calls, not preempted by Communications Act); Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381, 386 (9th Cir. 1995) (per Brunetti, J.) ("obligations imposed under state law causes of action for unfair competition, interference with contract, and interference with prospective economic advantage are in addition to [Communications Act] obligations"); Cooperative Communications, Inc. v. AT&T Corp., 867 F. Supp. 1511, 1516 (D. Utah 1994) ("inclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action"); Financial Planning Institute, Inc. v. American Tel. and Tel. Co., 788 F. Supp. 75, 77 (D. Mass. 1992) (holding breach of contract claim, based on AT&T's failure to accurately record length of "800" calls, not preempted by Communications Act).

Under the principles stated in Nader, claims that are not "absolutely inconsistent" with the intended effect of the Communications Act are preserved. COT's common law tort claim for intentional interference with business relations is not at all inconsistent with the Communications Act's statutory scheme. The claim does not seek to enforce a special rate, or an agreement to provide extra services at the tariffed rate. Holding that the claim is nevertheless barred would be inconsistent with the Act and would expand the filed rate doctrine beyond the scope defined in this Court's prior decisions.

### C. COT Sought No Undue or Unreasonable Preference or Advantage from AT&T

AT&T argues that COT's claims would obligate it to provide faster provisioning than required by the tariff and billing services that were not required by the tariff. This argument mischaracterizes COT's claims.

The tariff provides as follows with respect to provisioning:

> "The Company will make every reasonable effort to assure that the offering ordered is furnished on the due date. However, in some cases a delay in the installation may be unavoidable. If an order is delayed beyond its due date for more than 45 cumulative calendar days and such delay is not requested or caused by the Customer, the Customer may cancel the order without penalty or payment of non-recurring charges."

AT&T Br. App. 20a.

The jury's verdict neither imposed obligations on AT&T with respect to provisioning that were different from those set forth in this tariff provision, nor granted COT an "undue preference." COT did not prove only that AT&T failed to provision orders by the due date, or even within 45





calendar days of the due date.[9] Rather, COT proved that instead of making "every reasonable effort" to assure provisioning on the due date, as its tariff required, AT&T intentionally delayed the provisioning process to drive COT and other resellers out of business. ER 458, 1277.

With respect to billing services, AT&T contends that the following tariff provision exclusively governed its obligations:

> "The company will not allocate the usage of a Custom Network Service or the charges for such usage and is not responsible for the way the Customer may allocate usage or charges among multiple Users, except when a Customer subscribes to Custom Software Defined Network Service Location Account Billing Option . . . .

AT&T Br. App. 24a.

Again, COT did not seek service from AT&T that was inconsistent with this tariff provision. One aspect of COT's claim with respect to billing was that AT&T billed COT through the Custom Software Defined Network Service Location Account Billing Option ("LABO"), even

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[9] In fact, COT proved that within three months after COT's first account had been placed on SDN, AT&T suspended provisioning entirely for a two month period (ER 458, 529-30, 1763-64, 2556-57), and that by that time AT&T was taking an average of over six months to install a customer. ER 458-59, 516, 794.

though COT had not subscribed to that option.[10] COT also proved that AT&T's billings were grossly inaccurate. ER 471, 968, 1709, 1754. COT presented testimony that AT&T randomly applied debits, misapplied credits, and either ignored or misapplied discounts. ER 481-86, 1754, 1755, 2640, 2669, 2672-73, 4171. COT also proved that it was devastated by a loss of customers due to "suppressed billing." ER 488, 736-41, 1573, 1861-62, 4313, 4645.[11] Requiring AT&T to provide accurate and timely bills does not impose an obligation on AT&T that is at odds with the tariff or confer an undue or unreasonable preference on COT.[12]

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[10] LABO was not an appropriate billing option for a reseller such as COT. ER 412-15, 4399. Use of LABO caused 100% of the SDN discounts to be allocated to COT's customers. ER 1762, 2600-01. Thus, from the inception of its SDN contract through December 1990, when AT&T finally admitted that it had incorrectly placed COT on LABO (ER 1760-61, 4201-02), COT received virtually no income from its share of SDN discounts. ER 468-69, 471, 968, 1709, 1754.

[11] Suppressed billing occurs when a location is on the SDN network but does not have a "billing guide" in place to match its phone usage billing record. ER 869. The billing system has nowhere to register calls and they are lumped into an "unbilled" toll group until the billing guide is set up. ER 488-89, 502, 868-69, 1901. Once the guide is set up these calls are finally billed. ER 488-89, 1925-28. COT's customers became irate when they were billed for calls placed up to a year earlier. ER 488, 517, 1576, 4263, 4308.

[12] AT&T implies that the jury's failure to award the termination charges that AT&T sought by counterclaim resulted in an undue preference to COT. The trial court instructed the jury that the tariff permitted COT to terminate without penalty if the termination was due to AT&T's provisioning delays and billing problems. ER 3364. AT&T did not





The evidence at trial contradicts AT&T's argument that COT was seeking better or faster services than the tariff provides.

## III. THE TARIFF ITSELF ALLOWS RECOVERY FOR WILLFUL MISCONDUCT

Even if, as AT&T argues, the tariff exclusively governed the parties' relationship, the relief awarded to COT was entirely consistent with the tariff. Section 2.3.1 of the tariff states that AT&T's liability for willful misconduct is not limited by the tariff. AT&T Br. App. 10a.

The jury found that AT&T engaged in willful misconduct. The relief awarded to COT was proper even under AT&T's broad reading of the filed rate doctrine.[13]

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take exception to that instruction. Thus, AT&T did not preserve the argument that a failure to award termination charges would unduly prefer COT. AT&T's counterclaim for unpaid charges also failed in the face of evidence that roughly $130,000 of unpaid toll resulted from AT&T's incorrect billings (ER 3102), that another $68-69,000 in purported charges had no explanation (ER 3102-03), and that AT&T's billings otherwise showed wild fluctuations and flawed calculations. ER 3105-12, 4463-79.

[13] AT&T argues that it cannot be held liable for its willful misconduct because the filed rate doctrine invalidates any obligations imposed on it that were inconsistent with the tariff. As set forth above, the evidence contradicts that argument. The jury's verdict did not impose obligations on AT&T that were different from those set forth in the tariff. The argument is also contradicted by the language of the tariff,

## IV. AT&T'S BROAD READING MISSTATES AND MISAPPLIES THE FILED RATE DOCTRINE

The core of AT&T's argument is that the judgment of the Ninth Circuit is inconsistent with the statutory requirement that each carrier file tariffs "showing all charges for . . . communications between the different points on its own system and showing the classifications, practices, and regulations affecting such charges." Because COT was charged the rates specified in AT&T's tariff, the argument turns entirely on a broad reading of the requirement that carriers tariff not only charges but also the "classifications, practices, and regulations *affecting such* charges."

Citing a series of Interstate Commerce Act cases dating from early in the century, AT&T claims that the filed rate doctrine applies not only to rates but "equally to . . . any of the *services* within the purview of the Act."

Following this argument to its logical conclusion, AT&T claims that a term or condition that is of value to a customer is void even if it is not inconsistent with the tariff – if, for example, it addresses an issue on which the tariff is silent. To AT&T, "the tariff describes the entirety of the

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which must "be construed against the framer [AT&T] and favorably to users . . . ." The Associated Press, 72 F.C.C. 2d 760, 764-65 (1979), quoting, Commodity News Servs., Inc., 29 F.C.C. 1205 (1960). See also United States v. I.C.C., 198 F.2d 958, 966 (D.C. Cir.), cert. denied, 344 U.S. 893 (1952).





legal relationship between the carrier and customer, and its terms 'are conclusive as to the rights of the parties.'"[14]

AT&T's reading of Section 203 is inconsistent with the text and plain meaning of the Communications Act, its own representations and arguments to this and other courts and agencies, its behavior (and that of other carriers) in the marketplace, and the applicable case law.

### A. AT&T's Expansive Reading of the Filed Rate Doctrine is Unsupported by the Communications Act

The services which AT&T promised and did not supply do not affect its rates. The notion that anything that is either of value to the customer or imposes costs upon the carrier "affects" the carrier's charges defies the dictionary, common sense, and the universal experience of contracting in a market economy.

Nothing in the language of Section 203 of the Communications Act supports a broad. "field occupying" reading of the tariff-filing requirement. Congress could have required carriers to file all of their "classifications, regulations or practices,"[15] but it chose to require the filing

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[14] AT&T Petn. at 13, quoting, Atchison, T&S.F. Ry. Co. v. Robinson, 233 U.S. 173, 34 S. Ct. 556 (1914).

[15] Section 202(a) makes it unlawful for any carrier "to make *any* unjust or unreasonable discrimination in charges, practices, classifications, regulations, or services for or in connection with like communication service, directly or indirectly, by *any* means or device." (Emphasis added.)

only of "classifications, regulations or practices affecting . . . charges." Congress also could have said that the tariff regime is to supplant state law with respect to disputes between carriers and their customers,[16] but it did precisely the opposite, declaring that "[n]othing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute . . ."[17]

To "affect" means to "produce an effect on", The Oxford Dictionary and Thesaurus (1996), or to "act on; produce an effect or change in". Random House Webster's Unabridged Dictionary (2nd ed. 1997).[18] To be sure, terms and conditions of a contract can affect rates even if they do not state rates –common examples in the telecommunications industry would include clauses waiving otherwise applicable installation charges or varying standard (*i.e.*, tariffed) under-utilization charges.

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[16] Compare former ADA, 49 U.S.C. § 1305(a)(1), prohibiting the states from enforcing any law "relating to rates, routes, or services" of any air carrier.

[17] 47 U.S.C. § 414. Compare Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 106 S. Ct. 1890 (1986), in which this Court sharply limited the FCC's right to override intrastate telecommunications depreciation schedules in light of an express provision in the Communications Act denying the FCC jurisdiction over intrastate communication service.

[18] See also Black's Law Dictionary (6th ed. 1990) (to "act upon; influence; change; enlarge or abridge"); Webster's New World College Dictionary (3rd ed. 1997) ("to have an effect on or influence; produce a change in"); Webster's Ninth New Collegiate Dictionary (1986) (to "produce an effect upon").





But it is also plain that a clause can be both material and of great value to a customer with*out* "affecting" carrier charges. Examples would include arbitration clauses, a promise that the installation schedules presented by the carrier will in fact be met, and a promise of accurate and timely billing.[19]

The plain and logical meaning of the term "rate affecting" is that there is a higher rate associated with the presence of a particular term or condition and a lower rate associated with its absence (or vice versa).[20] AT&T actually echoes this view at one point in its brief. Describing two billing options for SDN customers,[21] AT&T avers that "neither of these options is described in the tariff, *for no separate charge is imposed for either option.*" AT&T Br. at 8.

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[19] In the instant proceeding, as noted above, AT&T concedes that it did not tariff multi-location billing, a service feature that is of value to resellers. AT&T Br. at 8.

[20] This occurs in the traditional lost baggage case in which a customer seeks to recover more than the tariff allows for his luggage without having paid the tariffed charges for customers seeking a higher limit of liability. Boston & M.R. Co. v. Hooker, 233 U.S. 97, 111, 34 S. Ct. 526, 528 (1913) ("When there are two published rates, based upon difference in value, the legal rate automatically attaches to the declared or agreed value.").

[21] Under one of these options (multi-location billing or MLB), AT&T sends separate bills to each end user location. Multi-location billing is extremely valuable to resellers who do not wish to absorb the expense of preparing and sending bills.

### B. AT&T's Expansive Reading of the Filed Rate Doctrine is Inconsistent with its Own Marketplace Behavior

In an amicus brief filed contemporaneously in this case, a group of large AT&T customers describe un-tariffed contracts ranging from 50 to 100 pages in length. AT&T's brief alludes to these agreements, admitting that "many features of service and many choices to be made in implementing service requests under a tariff . . . do not affect charges, . . . do not have to be specified in tariffs, and . . . are worked out by carriers and their customers. . . " AT&T Br. at 35.

But the terms and conditions in these agreements appear to cover areas such as control over carrier personnel, acceptance testing, billing/invoicing and implementation/installation schedules. Many are unquestionably of value to customers and impose costs on AT&T, belying the definition of "affecting" for which AT&T argues in this case. As set forth in the amicus brief, the provisions that AT&T places in the individualized "options" it files with the FCC invariably involve a charge, the withdrawal of such a charge, or conduct that will result in the imposition, removal or change in a charge. The provisions that AT&T does *not* tariff (i.e., file in the individualized options) do not, on their face, affect AT&T charges.

The filed rate doctrine mandates that there be strict adherence to tariffed rates and tariffed "classifications, practices, and regulations" affecting rates. The doctrine does nothing more. As AT&T concedes, it cannot and does





not reach aspects of service that need not be spelled out in the tariff. AT&T Petn. at 35.

### C. AT&T's Expansive Reading of the Filed Rate Doctrine is Inconsistent with Decisions of This and Other Courts

The cases do not support AT&T's expansive reading of the filed rate doctrine. AT&T's heavy reliance on cases that directly involve tariffed rates begs the question of what must be tariffed. And the cases do not support the substantive scope with which AT&T invests the filed rate doctrine.

AT&T's evades the question of what must be tariffed. Thus, AT&T's reliance on cases that involve rates, which COT agrees must (for now) be tariffed, is misplaced. These cases include MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229-31, 114 S. Ct. 2223 (1994); Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 128, 110 S. Ct. 2759 (1990), and Keogh, 260 U.S. at 163 (1922).[22]

The filed rate doctrine cases fall into distinct categories that are inapposite here. One category involves

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[22] An example of AT&T's confusing of the issues is its assertion that the filed rate doctrine "operates as a strict rule against use of 'parol' evidence and alleged side agreements . . . ." AT&T Petn. at 25. That assertion might be relevant if COT were seeking to contradict tariffed rates or "rate affecting" provisions, but the issue here concerns matters outside the scope of the tariffing requirement.

departures from the explicit terms of a tariff through mistaken rate quotations or secret deals for non-tariffed rates. See, e.g., Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97, 35 S. Ct. 494 (1915) (railroad passenger erroneously charged $49.50 for trip when the tariffed rate was $78.65); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566, 141 S. Ct. 584 (1921) (telegraph company not liable for damages stemming from transmission error where user failed to use more expensive service with greater accuracy and increased liability); Boston & Maine R.R. v. Hooker, 233 U.S. 97, 34 S. Ct. 526 (1914) (railroad passenger's recovery under breach of contract action for damaged baggage limited by tariff terms even if passenger was unaware of tariff terms).

A second category concerns agency interpretations of, and policies regarding, the tariffs filed by companies that they regulate. See, e.g., I.C.C. v. Transcon Lines, 513 U.S. 138, 115 S. Ct. 689 (1995); MCI v. American Tel. & Tel. Co., 512 U.S. 218, 114 S. Ct. 2223 (1994); Reiter v. Cooper, 507 U.S. 258, 113 S. Ct. 1213 (1993). These cases, too, are inapposite, because the claims here were raised under state law, and neither the FCC nor its policies played any role in the proceedings.

The filed rate doctrine requires adherence to the terms of the rate schedules that must be filed under the statute. It is not an aid in determining the threshold issue of what must be tariffed, but rather a rule of construction mandating strict adherence to the statutorily-mandated terms of filed rates and foreclosing certain equitable defenses that might otherwise be raised. See Maislin, 497 U.S. at 128 ("filed rate doctrine . . . follows from the





requirement that only filed rates be collected, . . . the requirement that rates not be discriminatory, . . . and the requirement . . . that carriers adopt reasonable rates and practices.").

What the filed rate doctrine is *not* is as important as what it is. This Court recently rejected the suggestion that the filed rate doctrine trumps all other aspects of the regulatory scheme:

> Respondents contend that the so-called 'filed rate doctrine' gives them absolute entitlement to judgment on their undercharge claims, without defense or counterclaim. We disagree. The filed doctrine rate embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate."[23]

The fact that AT&T's arguments to this Court contradict its arguments elsewhere and its conduct has important implications for a policy that would mandate unyielding and broad application of the filed rate doctrine. This Court (and others) have always recognized that

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[23] Reiter, 507 U.S. at 265. See also I.C.C. v. Transcon Lines, 513 U.S. at 147 ("Carriers must comply with the comprehensive scheme provided by the statute . . . and their failure to do so may justify departure from the filed rate."); Maislin, 497 U.S. at 126 (filed rates, under certain circumstances, can be "suspended or set aside").

stringent application of the filed rate doctrine yields "harsh" consequences for the customers who are victims of misrepresentations by carriers, and would otherwise be entitled to rely upon the promise of those carriers to receive the benefits of their good faith agreements. The admittedly unjust enrichment of carriers has been justified on policy grounds – the theory is that customers in general benefit because carriers are prevented from discriminating in favor of preferred customers by entering into "side deals."

In the present case this end is hard to see. It is difficult to conceive how AT&T customers will be disfavored if COT is permitted to recover, even if COT's status as a competitor of AT&T is disregarded. The nature of the contractual commitments that underlie this case is instructive. AT&T did not commit to extend "special treatment" to COT. The obligations that it undertook, and that it is now seeking to avoid, were to provide accurate and timely bills and to make reasonable efforts to install circuits for the services in question. The import of AT&T's argument is that customers should be required to pay extra for accurate or timely bills, or for reasonable efforts to install circuits. Outside of the world of common carriers those arguments would be dismissed out of hand.

In light of the language of the statute, AT&T's implicit argument that a tariffed term or condition "trumps" an agreement with a customer in areas that are *not* rate-affecting (and therefore do not have to be tariffed) is untenable, as is its related argument that a contract cannot be referred to interpret, explain or "fill in" a tariff in areas where the tariff is silent, incomplete or ambiguous.





## V. THE COMMUNICATIONS ACT DOES NOT REQUIRE THAT TARIFFS GOVERN RELATIONS BETWEEN COMMUNICATIONS CARRIERS

The Communications Act permits carriers to order their relations with other carriers by contract. Tariffs may supplement such contracts as incorporated contract terms, but they do not govern the carrier-to-carrier relationship to the exclusion of contracts.

COT and AT&T are both carriers within the meaning of the Communications Act.[24] Section 211 of the Act (COT Br. App., 1a) authorizes carriers to enter into contracts with one another, and envisions that their relationships will be governed by their contracts as opposed to tariffed rates. See Bell Telephone Company of Pennsylvania v. F.C.C., 503 F.2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026, reh. denied, 423 U.S. 886 (1975).

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[24] See 47 U.S.C. § 153(10) (the term "'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio. . .") and 47 U.S.C. § 154(44) ("The term 'telecommunications carrier' means any provider of telecommunication services, except that such term does not include aggregators of telecommunication services (as defined in section 226 of this title). COT does not meet the definition of an "aggregator" set forth in 47 U.S.C. § 226(a)(2): "The term 'aggregator' means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."

Bell Telephone turns on Section 211 and the statement in 47 U.S.C. § 203(c) that carriers must operate by tariff "unless otherwise provided by or under authority of [Title II of the Act]." 503 F.2d at 1276. The court noted that 47 U.S.C. § 201(b) allows regulated carriers to enter into contracts with non-regulated carriers, and that § 211(a) requires the filing of contracts between two or more regulated carriers as well as contracts between regulated and non-regulated carriers. Id. at 1277. The Third Circuit found that both sorts of contracts are within the caveat reserved by § 203(c), such that "carriers regulated by the Act may order their business relations by contract as well as by tariff." 503 F.2d at 1277. The court then concluded that the FCC had acted properly in rejecting a tariff filed by AT&T to the extent that the tariff conflicted with the terms of a contract between AT&T and another carrier.

The Third Circuit's decision in Bell Telephone is consistent with this Court's decisions in Armour Packing Co. v. United States, 209 U.S. 56, 28 S. Ct. 428 (1908), on the one hand, and United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 76 S. Ct. 373 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 76 S. Ct. 368 (1956), on the other. Armour held that special rate agreements between a shipper and a railroad were precluded by the Interstate Commerce Act, which makes no provision for the filing of such contracts. Mobile and Sierra, on the other hand, hold that individual contracts *are* enforceable under the Natural Gas Act and the Federal





Power Act, which (like the Communications Act) provide for individual contracts.[25]

AT&T's argument that its tariff exclusively governs its contractual relationship with COT is incorrect. Even if COT had sought to enforce contractual terms that were inconsistent with AT&T's tariff, which it did not, as a carrier COT would be permitted to do so.

AT&T's *ex parte* filing with the FCC concerning the effect of permissive detariffing (which AT&T supports) confirms this analysis. AT&T argued in that filing that if tariffs are optional, when a contract incorporates a tariff—as COT's did—the tariff is incorporated as a contract term, not as a tariff *per se*, and the filed rate doctrine simply does not apply.[26] The analysis applies—indeed, has always applied—to the terms and conditions of contracts between carriers, which as noted above have never had to be tariffed even when they are rate-affecting.

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[25] The decision in Bell Telephone that carrier-to-carrier contracts are permitted by the Communications Act and they cannot be abrogated by tariffs has been followed by the Second Circuit in Western Union Intern., Inc. v. F.C.C., 568 F.2d 1012, 1020 (2nd Cir. 1977), cert. denied, 436 U.S. 944 (1978), and by the District of Columbia Circuit in MCI Telecommunications Corp. v. F.C.C., 665 F.2d 1300, 1302 (D.C. Cir. 1981). See also American Broadcasting Companies, Inc. v. F.C.C., 643 F.2d 818 (D.C. Cir. 1980) (acknowledging distinction between carrier-to-customer contracts and carrier-to-carrier contracts); Global Access Ltd. v. AT&T Corp., .978 F. Supp. 1068, recon. denied, 1997 S2 784573 (S.D. Fla., Oct. 10, 1997) (No. 94-2192-CIV-GOLD).

[26] COT Br. App. 4a-6a.

## VI. EXPANDING THE FILED RATE DOCTRINE WOULD BE INCONSISTENT WITH THE TELECOMMUNICATIONS ACT OF 1996

National policy, as evidenced in the Telecommunications Act, has now shifted away from tariffs as a necessary tool for preventing discrimination. Given this shift, this Court should decline to expand the filed rate doctrine. The broad reading of "affecting . . . charges" that is central to this case is judge-made, not statutory – it is a part of the "common law" of rate regulation statutes. The tariff filing requirement was designed to address the provision of certain vital services in a society that wanted their providers to be private but believed that the services in question were (whether "naturally" or otherwise) monopolies. The writers of the Communications Act, and the judges interpreting the Act, were fearful of gouging or discriminatory conduct on the part of the service providers. They sought to address this fear by requiring that rates and rate-affecting terms be filed with regulators, who would review them and allow them to take effect only if they were just, reasonable, and non-discriminatory. In return, regulated service providers were promised a fair return on their investment, and their tariffs, once approved, would become regulations with the force of law.[27]

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[27] Except in the filed rate doctrine, which is fiercely defended by the major carriers (see MCI Telecommunications Corp. v. F.C.C., No. 96-1459, D.C. Cir., Feb. 13, 1997), and certain areas where monopoly or near-monopoly continues to characterize the provision of utility





In MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 114 S. Ct. 2223 (1994), this Court reiterated its view of the importance of rate filings. There, the Court voided the FCC's efforts to eliminate tariffs, finding that the Commission's authority to "modify" the filing requirement could not fairly be read to extend to the elimination of that requirement. According to the Court,

> The tariff filing requirement is . . . the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model, . . . this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges. . . As the Maislin court concluded, compliance with these provisions is 'utterly central' to the administration of the Act.
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> . . . Rate filings are, in fact, the central characteristic of a rate-regulated industry. It is highly unlikely that Congress would leave the determination of whether an

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services (such as local exchange service in many areas),the world that underlies the tariff edifice has largely disappeared. The FCC ceased to review the tariff filings of interexchange carriers years ago, and those filings now take effect on one day's notice. Because tariffs continue to have the force of law, the result is to give carriers the unilateral right to alter their contracts.

> industry would be entirely, or even substantially, rate-regulated to agency discretion....
>
> . . . What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934. [28]

Id. at 229-232.

Accepting the invitation implicitly extended by the Court in MCI v. AT&T, Congress enacted Section 10 of the Telecommunications Act of 1996, 47 U.S.C. § 160(a)(1). Section 10 *requires* the FCC to forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier if the Commission determines that (1) enforcement is not necessary to ensure that charges, practices, classifications or regulations by the carrier are just and reasonable, (2) enforcement is not necessary for the

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[28] In a footnote, the Court expressed the view that while eliminating the tariff filing requirement would not necessarily frustrate complaint proceedings, "we (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." Id. at 231, n.4.





protection of consumers, and (3) forbearance is consistent with the public interest.

Section 10 gave the FCC the authority it needed to eliminate the tariff filing requirement, expressing in no uncertain terms Congress' desire that regulatory requirements that cannot be justified on public interest grounds not only may but must be removed.[29]

The FCC moved quickly to eliminate tariffs for certain communications services. In its Policy and Rules Concerning the Interstate Interexchange Marketplace (CC Docket No. 96-61), FCC 96-424 (released October 31, 1996), 61 Fed. Reg. 59340 (November 22, 1996), the FCC ordered nondominant interexchange carriers[30] to cancel all tariffs for interstate, domestic, interexchange services currently on file with the FCC, and prohibited nondominant interexchange carriers from filing tariffs for such services in the future. 61 Fed. Reg. at 59353.

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[29] As AT&T concedes in its brief, Section 10 of the Act encompasses the tariff filing requirement. In fact, the 1996 Act was a direct response to this Court's decision in MCI v. AT&T, and was designed to reverse that decision insofar as it limited the FCC's authority to eliminate regulatory requirements (including the tariff filing requirement) under the Communications Act as previously written.

[30] Previously on October 23, 1995, the FCC issued an order granting AT&T's motion to be reclassified as a nondominant carrier. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (rel. October 23, 1995), recon. pending.

Among the public interest benefits identified by the FCC in support of detariffing were "eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment." 61 Fed. Reg. at 59349.

The importance of the recent actions of Congress and the FCC to this case lies in their implications for the "common law" of the Communications Act. If the tariff filing requirement is not the "heart" of the Act, then the savings clause in Section 414 (COT Br. App. 7a) is not a dead letter, and carriers should be subject to common law liability except where the Act clearly requires otherwise. The filed rate doctrine may not disappear until the FCC's efforts to eliminate it take effect, but a broad reading of the doctrine in the manner of the dissent below is no longer sustainable.

When national policy shifts through Acts of Congress, this Court has revisited prior doctrines to bring them into harmony with national policy. For example, the Wilko doctrine held that pre-dispute agreements to arbitrate securities claims were void because they violated national policy embedded in the Securities Act of 1933. Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182 (1953). But national policy shifted strongly in favor of arbitration when the Arbitration Act, 9 U.S.C. § 1 et seq., was passed by Congress, and the Court overruled Wilko. Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 479, 109 S. Ct. 1917 (1989).





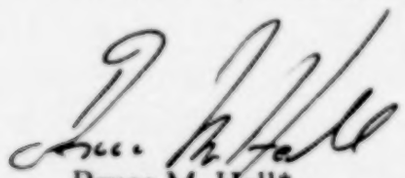
Similarly, the Sinclair doctrine held that the anti-injunction provisions of the Norris-LaGuardia Act precluded federal courts from enjoining a strike even though the parties had entered a no-strike agreement calling for binding arbitration. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 82 S. Ct. 1328 (1962). But in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 238, 90 S. Ct. 1583 (1970), the Court reexamined the Sinclair doctrine on the grounds that it departed from the "congressional policy to promote peaceful settlement of labor disputes through arbitration". Id. at 241. The Court added that in light of events subsequent to Sinclair, "it has become clear that the Sinclair decision does not further but rather frustrates realization of an important goal of our national labor policy." Id.

In both of the foregoing cases, a shift in national policy led the Court to revisit prior decisions. National policy with respect to telecommunications law has now shifted away from tariffing as an inevitable and essential tool for the prevention of unreasonable discrimination. Given this shift, this Court should decline to expand the filed rate doctrine to include claims of competitors for interference and other anti-competitive conduct.

## CONCLUSION

For the foregoing reasons, COT respectfully requests that the judgment of the Ninth Circuit be affirmed.

Respectfully submitted,



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# APPENDICES

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# TITLE II - COMMON CARRIERS

## Part I - Common Carrier Regulation

Sec. 211 [47 U.S.C. 211] Contracts of Carriers; Filing with Commission

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

[Under cover letter dated July 17, 1996 from Judith D. Argentieri, AT&T Government Affairs Director, to William F. Caton, Acting Secretary, Federal Communications Commission]

**AT&T Ex Parte Presentation -- CC Docket No. 96-61**

**Permissive Detariffing And The Filed Rate Doctrine**

Although a majority of commenters in CC Docket No. 96-61 support permissive detariffing, a few commenters continue to support mandatory detariffing,[1] at least for negotiated service arrangements, based on the purported concern that unless detariffing were mandatory, carriers could continue to file tariffs and invoke the filed rate doctrine to make unilateral changes to carrier-customer deals. A brief analysis of the filed rate doctrine, however, makes plain that this "problem" is chimerical. The filed rate doctrine is a product of a specific legal regime -- a

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[1] As explained in its comments in this docket, and in its July 10, 1996 ex parte, AT&T does not believe that the Commission may lawfully order mandatory detariffing, for two reasons. First, the Commission's authority under Section 10 permits it to refrain from requiring tariffs, but does not extend to prohibiting the filing of tariffs. Second, because the record establishes that mandatory detariffing would impose enormous costs on carriers and customers, particularly with respect to casual calling and services provided to residential and small business customers, with no countervailing benefits that could not be achieved through permissive detariffing, a mandatory detariffing rule would not be "in the public interest."





regime of mandatory tariffs -- not a talisman that trumps all contractual agreements. As explained below, under a permissive detariffing regime, a written contract could specify that it is controlling over subsequent tariff filings, and the customer could then assert the contract as a defense to any claim based on such filed tariffs.

The filed rate doctrine was the product of two interrelated subsections of the Interstate Commerce Act (ICA). First, the ICA required that carriers make public filings disclosing their rates. Second, and correlatively, carriers were prohibited from charging or collecting any rates other than filed rates. These two requirements served as the model for Sections 203(a) and (c) of the Communications Act.[2] The purposes of the tariff requirements of both the ICA and the Communications Act were "to render rates definite and certain, and to prevent discrimination and other abuses"[3] by ensuring that all customers paid the same charges -- the filed rate -- for the same service. In numerous decisions, the Supreme Court construed these requirements to mean that "the rate of the carrier duly filed is the only lawful rate."[4]

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[2] MCI v. AT&T, 114 S. Ct. 2223, 2231 (1994).

[3] Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990) (citing Arizona Grocery Co. v. Atchison T. & S.F.R.R. Co., 284 U.S. 370, 384 (1932)).

[4] E.g., id. at 127, quoting Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915).

The Supreme Court's decisions make clear that that the filed rate doctrine necessarily derives from the requirement that all rates be filed. The sole purpose of the filed rate doctrine is to enforce a regime in which tariff filings are mandatory. As the Supreme Court explained in Maislin, allowing a carrier to charge other than filed rates would "render nugatory" the statutory requirement that all rates be filed.[5] The filed rate doctrine thus reduces to a syllogism: If a rate must be filed in order to be valid, then unfiled rates cannot be valid.

By exercising its statutory forbearance authority to adopt permissive detariffing, the Commission would eliminate the major premise of the syllogism -- the requirement that all rates be filed. Valid and enforceable rates can be established through mechanisms other than filed tariffs, such as through unfiled contracts. There is simply no basis for the assertion that the filed rate doctrine would vitiate contract rates in a permissive detariffing scheme. A carrier that had agreed to rates in an unfiled contract could no longer claim that the filed rate was the "only lawful rate."

Indeed, the courts have recognized that where the statute at issue, or the agency acting within its statutory authority, permits rates and other terms of service to be established other than through filings with the agency, the filed rate doctrine does not apply.[6] Thus, in Maislin, the

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[5] Maislin, 497 U.S. at 132.

[6] See Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571 (1981) (recognizing that carrier must charge and collect the filed rate,





Supreme Court invalidated the Interstate Commerce Commission's (ICC) "Negotiated Rates" policy based on its conclusion that the ICC had no authority to abrogate the ICA's requirement that all rates be filed. Conversely, the court's opinion makes clear that the Negotiated Rates policy could have been sustained had the ICA given to the ICC the forbearance authority which Congress has now given to the Commission in Section 10.[7]

It has nevertheless been suggested that in a permissive detariffing regime, a carrier could "voluntarily" file and attempt to enforce a tariff against a customer with which the carrier had previously entered into a written agreement providing that the contractual terms would control over any inconsistent tariff provisions. This argument, which is based on the language in Section 203(c) requiring that a carrier charge and collect its filed rates, ignores the fact that the Commission's Section 10 forbearance authority extends to Section 203(c) no less than to Section 203(a). Indeed, Section 203(c) itself provides that its requirement that carriers collect their filed rates is inapplicable where "otherwise provided by or under the

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"[e]xcept when the Commission [validly] permits a waiver"). In a later proceeding in Arkansas Louisiana, the Fifth Circuit observed that the Supreme Court's decision in that case "clearly recognized that the waiver provisions of [15 U.S.C. § 717(d) authorized] the Commission to waive the usual requirements of timely filing of an alteration in a rate." Hall v. FERC, 691 F.2d 1184, 1189 (5th Cir. 1982) (quotation omitted). Accordingly, Hall v. FERC expressly noted that the filed rate doctrine would not bar exercise of FERC's waiver authority. Id.

[7] Maislin, 497 U.S. at 133-35.

authority of this Act." If the Commission were to exercise its authority under new Section 10 to forbear from enforcing Sections 203(a) and 203(c) when a carrier and a customer have entered into an unfiled written agreement, and thereby adopt permissive detariffing, a carrier could not invoke the filed rate doctrine to make unilateral changes to the terms of their deal.[8]

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[8] Permissive detariffing would operate in a manner analogous to the role of the Uniform Commercial Code in contracts for the sale of goods. Parties to such contracts may specify that the "default" provisions in the UCC do not govern their relationship, and instead may specify alternative terms. Similarly, carriers and customers may provide that any or all of the terms in the contract apply in lieu of otherwise applicable tariff provisions.





## COMMUNICATIONS ACT (47 U.S.C. § 414)

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in additional to such remedies. (June 19, 1934, c. 652, Title IV, § 414, 48 Stat. 1099.)